NO. 83-1595

In The

Supreme Court Of The United States

OCTOBER TERM, 1983

ARMAND VALERIANO,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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QUESTION PRESENTED

Did The Connecticut Supreme Court Properly Apply The Doctrines Of Statutory Interpretation And Evidentiary Relevancy In Its Denial Of This Defendant's Appeal From A Conviction For Felony Murder?

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STATUTES AND RULES INVOLVED

Rule 17.1

Revised Rules of the Supreme Court of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

On June 19, 1978, the defendant, Armando Valeriano, was indicted for arson felony murder, Conn. Gen. Stat. § 53a-54c.[1] On February 11, 1980, after a three month trial, the defendant was found guilty as charged. Prior to and during trial, the defense raised several motions pertaining to the competency of the state's primary witness, Julian Taylor. After court ordered examinations and testimony relating thereto, the court determined that Julian Taylor was a competent witness.

The factual situation resulting in the defendant's conviction is as follows:

On the evening of January 14, 1977, firefighters responded to an alarm at 281-283 Newhall Street, New Haven, Connecticut. Smoke and flames were concentrated primarily in the rear of the building. During the course of extinguishing the fire, in the second floor apartment firefighters discovered the bodies of an adult male and an infant female. The infant, identified as six-month-old Tashika Nelson, died in April, 1978. The cause of her death was smoke inhalation sustained on January 14, 1977.

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[1] In relevant part, Conn. Gen. Stat. § 53a-54c (1979) provides:

> A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit . . . arson . . . and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (B) was not armed with a deadly weapon, or any dangerous instrument; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Julian Taylor was called as the state's chief witness. He testified that in January, 1977, he was approached by the defendant, an old friend, and asked by the defendant "to get rid of a house, torch a house." Julian Taylor was specifically told by the defendant that precautions would be taken to insure that the occupants of the second floor apartment would not be home. On January 14, 1977, at the defendant's direction, for a price of $500.00, Julian Taylor poured gasoline on the rear stairwell and landings of 281-283 Newhall Street, ignited the gasoline and departed the area.

Julian Taylor returned to the fire while it was in progress. He testified that due to his concern for those apparently injured, he immediately confessed his involvement to the police. He made several subsequent statements.

During direct examination, Julian Taylor admitted he was less than a model citizen, testifying about his involvement with several other New Haven area fires. He identified items of clothing and apparent incendiary equipment taken from his trunk on the night of the fire. He also testified concerning criminal convictions and alcoholism. During nine trial days of cross examination, Julian Taylor's testimony concerning the events of January 14, 1977 remained unchanged.

The conviction was affirmed on appeal.

THE CONNECTICUT SUPREME COURT DID NOT RESOLVE THE DEFENDANT'S CLAIMS IN A MANNER IN CONFLICT WITH APPLICABLE DECISIONS OF ANY COURT.

Rule 17.1 of the United States Supreme Court Rules provides a guideline for consideration governing review on certiorari. It is clear that the Connecticut Supreme Court did not decide a federal question in a manner in conflict with other applicable state or federal appellate decisions.

Defendant argues that under state and federal law, a criminal defendant's due process rights encompass the right to proper jury instructions on the issue of defenses; *compare State v. Miller*, 186 Conn. 654, 660-61, 443 A.2d 906 (1982) *with Cupp v. Naughten*, 414 U.S. 141, 146 (1973) ("Before a federal court may overturn a conviction resulting from a state trial in which [an improper] instruction was used, it must be established not merely that the instruction [was] undesirable, erroneous or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment"). However, the trial court properly refused to charge the jury on the felony-murder affirmative defense. Defendant therefore received the process which was due, the Fourteenth Amendment/due process challenge to defendant's conviction is without substance.

Defendant's reliance on *Washington v. Texas*, 388 U.S. 14, 19 (1967) for the proposition that "criminal defendants have a fundamental due process right to *establish* a defense" is, under the special circumstances of this case, highly misleading. *Washington* was concerned with the criminal defendant's fundamental right "to *present* a defense" and "to *present* ... witnesses to establish a defense"; *Washington v. Texas*, 388 U.S. at 19 (emphasis supplied). That case invalidated a unique Texas statutory scheme which deprived defendants of the advantage of exculpatory testimony from alleged accomplices or co-

conspirators. As such, that case has nothing to do with the case at bar, in which defendant, acting without comparable statutory or court-made restraints, simply failed to introduce sufficient probative evidence to raise the affirmative defense. *Washington* cannot stand, as defendant seems to believe, for the proposition that criminal defendants have a due process right to establish an affirmative defense notwithstanding an inability to raise the same.

The decision of the Connecticut Supreme Court clearly conformed with all applicable federal authority and, consequently, should not be disturbed.

Defendant also argues that it was error for the trial court to deny defendant's motion to exclude the State's chief witness as an incompetent. That alleged error was compounded, in defense counsel's view, when the court allowed the chief witness to claim a Fifth Amendment privilege several times during the nine days of his cross-examination. The chief witness's invocation of the Fifth Amendment, the argument continues, abridged the defendant's Sixth Amendment right to confront his accuser and therefore requires a reversal of defendant's conviction.

Testimonial waivers of Fifth Amendment protections are "not lightly to be inferred"; *Smith v. U.S.*, 337 U.S. 137, 150 (1949). Indeed, so disfavored are testimonial waivers of rights against self-incrimination in the law that "courts . . . indulge every reasonable presumption against finding [them]"; *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981).

It is for the trial court in each case to decide whether or not the invocation of the Fifth Amendment by a witness is proper; see *Hoffman v. U.S.*, 341 U.S. 479, 486-87 (1951). The trial court's determination, when based on particularized investigation into the grounds of the witness's assertion of the privilege, should accordingly be upheld absent clear error; *accord, Ex parte Irvine*, 74 F. 954, 960

(C.C.S.D. Ohio 1896) ([William Howard] Taft,J.) ("The question is for the discretion of the [trial] judge, and in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence").

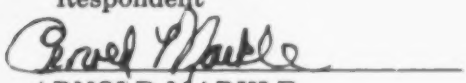
The privilege asserted in the present case was a valid exercise of the witness's right to protection against self-incrimination, thus not subject to attack by this defendant. The trial court's decision to allow this testimony was clearly not an abuse of discretion in light of the unique circumstances of this case. Just as the Connecticut Supreme Court rejected defendant's contention that the trial court abused its discretion, so should this Court.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED,

The State of Connecticut,
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I hereby certify that three copies of this brief have been mailed by April 16, 1984 to John R. Williams, Esq., 265 Church Street, New Haven, CT 06510.

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